

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et)
al.)

Plaintiffs,)

v.)

ENVIRONMENTAL PROTECTION AGENCY,)
et al.,)

Defendants.)

and)

AMERICAN CROP PROTECTION
ASSOCIATION, et al.,)

Intervenor-Defendants.)

Case No. C01-132C

Seattle, Washington

December 9, 2003

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

01-CV-00132-TN

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

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6 Proceedings recorded by computer-aided stenography.

7 THE CLERK: Case No. C01-132, Washington Toxics versus
8 EPA.

9 THE COURT: Make your appearances, please.

10 MS. GOLDMAN: Patti Goldman and Amy Williams-Derry for
11 the plaintiffs.

12 MR. HETTENBACH: Wayne Hettenbach, Department of
13 Justice, for the defendants.

14 MR. KLISE: Good morning, Your Honor. Michael Klise
15 for the intervenors.

16 THE COURT: Okay. Let me tell you why I wanted to get
17 together with you, and that is that there are several things in
18 the proposed forms of order that -- I want to tell you what I
19 propose to do, and then I want you to again try to see if you
20 can agree upon the language of the injunction. And if not, then
21 have competing forms. I want to give you guidance as to what
22 should go into the injunction.

23 The first issue that I identify the parties as being apart
24 from one another on is whether the ordinary high watermark of
25 waters where salmon are ordinarily found should be the scope of
the injunction. And that is what I'm going to do. Not waters
where salmon are -- that are theoretically accessible to salmon.

1 But I do propose to include estuaries to the extent that salmon
2 are ordinarily found in those estuaries.

3 And I wanted some guidance from you as to whether the
4 proposal that the defendants suggested, that is, looking to the
5 database available on www.streamnet.org for determining which
6 streams actually support salmon is a workable proposal.

7 MS. GOLDMAN: Your Honor, the StreamNet database is
8 comprehensive in Oregon, although it does not include estuaries.
9 It does not exist in California. The substitute that the
10 defendants have proposed is designed to identify surface waters,
11 not salmon presence.

12 And in Washington there's a competing database, and
13 Washington is turning to a habitat type of model, rather than
14 fish detections. So it's not comprehensive throughout
15 Washington state.

16 THE COURT: What is there that a party reading the
17 injunction could look at and say I can go to this and decide
18 whether I am confronted with a stream that has salmon in it?

19 MS. GOLDMAN: In Oregon, StreamNet would be useful.
20 In -- one comprehensive description of salmon-bearing streams
21 and waters is the critical habitat designations by the National
22 Marine Fisheries Service, many of which have been vacated. But
23 they accurately describe the stream reaches up to impassable
24 barriers where salmon are found at some point in the year, and
25 they do include the estuaries. That would be comprehensive.

1 It is not accessible in an internet web base, or some kind
2 of consumer-friendly access system, but it is an accurate
3 description.

4 THE COURT: How big a document is this?

5 MS. GOLDMAN: Well, they are federal register notices
6 for various salmon listings. They are single-spaced, small
7 print, probably several pages each of the identifying areas.
8 There are descriptors, but the descriptors would be salmon-
9 bearing streams and waters in a certain geographical reach, and
10 that doesn't tell you exactly where the salmon are.

11 THE COURT: What do you think we should do if we are
12 going to do what I said, that is, limit the scope of the
13 injunction to salmon-bearing streams and estuaries?

14 MS. GOLDMAN: That had actually been our intent by
15 describing waters -- types of water bodies used by salmon. When
16 we used the word "accessible," we didn't realize we were
17 triggering the objection that later arose. Used by salmon is
18 what Oregon states in its law and what CropLife has stated in
19 its preliminary brief.

20 I think people tend to know if salmon streams near where
21 their crops are and where they live are salmon bearing at some
22 point of the year, and that's generally how the states identify
23 salmon-bearing waters.

24 THE COURT: Okay. What's your reaction?

25 MR. HETTENBACH: If the Court's intention is to limit

1 the injunction to the areas where the waterways for salmon
2 ordinarily are, the plaintiffs proposal goes further than that.
3 By using critical habitat as they recommended using for
4 Oregon -- let's take Oregon and Washington, because California
5 is a separate case because of the availability of data.

6 If you use critical habitat for Oregon and Washington,
7 critical habitat is a geographic designation. The National
8 Marine Fisheries Service looks at an area and says we're just
9 going to carve out this area. That -- that area includes many,
10 many streams where salmon aren't actually there.

11 That's why under EPA's proposal we say take the StreamNet
12 database, which looks for where salmon are, and then overlay
13 that with the critical habitat designations that NMFS has
14 provided, and from that you can determine which streams
15 ordinarily bear salmon. There may be some streams that are
16 outside.

17 And the reason you do the overlay is because there may be a
18 few streams that go outside of critical habitat where salmon
19 actually are. So by doing the overlay you eliminate the streams
20 inside of critical habitat that don't ordinarily support salmon,
21 and you pick up whatever else you may miss with critical habitat
22 just by using that definition.

23 So the plaintiffs -- the way the plaintiffs have worded it
24 doesn't really get at what the Court wants to do. The way we've
25 worded it we think does.

1 I want to talk about California just briefly, because
2 California is a separate -- we described it differently for
3 California primarily because we don't have the benefit of
4 something like StreamNet, where the work has already been done
5 to determine where the salmon are.

6 What EPA has proposed is in those instances to use critical
7 habitat as a surrogate, and that is actually overinclusive.
8 We're going to capture waterways in that situation where salmon
9 actually are not. But we don't have -- and that is an overlay
10 with USGS stream maps. That will tell you actually where the
11 streams are, and what are streams.

12 THE COURT: Is the injunction limited to Washington,
13 Oregon and California?

14 MR. HETTENBACH: Yes, Your Honor. That's the way it
15 was worded, yes, Your Honor.

16 THE COURT: So what about using StreamNet for Oregon,
17 what he's proposing for California, and what for Washington?

18 MR. HETTENBACH: StreamNet also. They've surveyed
19 Washington. StreamNet has data on Washington and Oregon.

20 THE COURT: Is that right?

21 MS. GOLDMAN: Your Honor, StreamNet is a database that
22 has information supplied by state fish & wildlife agencies, and
23 Washington does participate. Unfortunately, there's a competing
24 database, and so it is not the place all of the data are sent.
25 And that's not -- it's not as up-to-date and it's not as

1 comprehensive.

2 If the Court wanted to describe the water bodies used by
3 salmon, StreamNet would help people figure that out.

4 THE COURT: Why don't we -- can you live with using
5 StreamNet for Washington and Oregon, and what he proposes for
6 California?

7 MS. GOLDMAN: Well, the difficulty with California is
8 that databases tend to identify surface waters, and it's on a
9 very coarse scale, so it won't catch all of the salmon-bearing
10 waters.

11 THE COURT: I think maybe that it's as good as we can
12 get, okay?

13 MS. GOLDMAN: Okay.

14 THE COURT: So do it that way, all right?

15 MS. GOLDMAN: Okay.

16 THE COURT: I propose that the injunction will exclude
17 all pesticides and herbicides as to which the EPA has made an
18 NLAA determination. I think I said that at the last hearing.
19 Then in the plaintiffs' proposed order at page -- at 9 there's
20 an exclusion of certain pesticides which I am willing to live
21 with. Do you hear what I'm saying?

22 Okay. Then on the size of the buffer zones, the one I had
23 most question about was fenbutatin-oxide, where you propose a
24 200 yard aerial buffer zone.

25 MS. GOLDMAN: Yes, Your Honor. On fenbutatin-oxide, in

1 the effects determination EPA recommended that buffer zone for
2 aerial spraying and aerial air blast spraying. We were not sure
3 whether the Court wanted to heed EPA's recommendation in the
4 effects determinations when they were larger than the 20 yard/
5 100 yard buffers that we had asked for across-the-board, and
6 that's the issue that's presented with the fenbutatin-oxide
7 larger area.

8 THE COURT: All right. Let's limit that one to 100
9 yards, okay? Otherwise, I propose to use the schedule of buffer
10 zones that the plaintiffs proposed. Also, on the
11 non-applicability of the injunction to particular pesticide
12 application programs, including public health vector control
13 programs, that's fine.

14 The defendants and plaintiffs disagree on noxious weed
15 programs. I propose to accept the plaintiffs' proposal in that
16 regard.

17 MR. HETTENBACH: Just a quick question for
18 clarification.

19 THE COURT: Yes.

20 MR. HETTENBACH: I believe we had competing versions of
21 the actual wording for the public health vector control. We
22 worded slightly -- Your Honor indicated you would take one. You
23 didn't say whose you were inclined to take.

24 THE COURT: The plaintiffs.

25 MR. HETTENBACH: Okay. Thank you, Your Honor.

1 THE COURT: On the NMFS authorized programs, that is
2 indoor uses, tree injection, et cetera, the plaintiffs' proposal
3 in that regard is fine. The proposed notification, plaintiffs
4 asked the Court to require EPA to inform registrants, et cetera,
5 et cetera. The plaintiffs' language in that regard is fine.

6 The last significant issue that I have is the application of
7 pesticides in urban areas. And as I understand it, the federal
8 defendants are concerned about a label notice in that regard.
9 Expand upon that, if you will, for me.

10 MR. HETTENBACH: Your Honor, what the plaintiffs have
11 proposed in their order effectively is a ban on all sale of
12 pesticide in urban areas (unintelligible) what they've proposed
13 is to prohibit the sale until the label is changed.

14 There are several problems with that. First of all, to
15 change a label EPA has to go through a FIFRA process. It's
16 steps they have to go through in order to make those changes.
17 The registrants have rights. They have -- there's a procedural
18 process that can take a while.

19 What the EPA has proposed instead is to say we will have
20 point of sale information available. So when someone goes in
21 and buys one of these pesticides in an urban area, there is
22 information right there that does all the things that the
23 plaintiffs have complained about.

24 THE COURT: Where would it be located?

25 MR. HETTENBACH: It's impossible to say, because you're

1 dealing with different retailers and different areas. It would
2 be available -- it's not something that is addressed, and that's
3 a detail that we don't believe how you could control exactly
4 where a retail outlet store would place it.

5 We -- I think the language we used said was for -- it was to
6 be provided with the product. So one would assume that that
7 would be right where the product is on the shelves. And EPA
8 would have this thing saying in urban areas you have to worry --
9 you shouldn't be -- you know, you have to be careful about
10 runoff into areas.

11 The other problems with -- you'd have this point of sale
12 distribution under EPA's proposal, and you'd have larger
13 educational efforts that the order describes. The other big
14 problem the way plaintiffs have worded this is that as EPA
15 starts making these determinations about different pesticides
16 that are -- the eight, some are having -- they're getting no
17 effect determinations, some are NLAA determinations, the labels
18 for each of those are going to have to be changing -- each time
19 EPA makes a decision then the label either won't be accurate, or
20 we're going to have to go through another process. That's a
21 tremendous cost, that's a tremendous burden upon the agency to
22 have to do that.

23 And conceivably because the findings are specific to
24 different salmon streams, different ESUs where the salmon are,
25 the same label couldn't be placed on the same pesticide in one

1 place as it is on the other. You'd have to have labels that
2 were specific to certain towns.

3 THE COURT: Can you live with a point of sale
4 notification that would have to be changed as the determinations
5 are changed?

6 MR. HETTENBACH: Well, we -- EPA's -- the proposal they
7 put forward is a point of sale notification, and what the
8 notification would hopefully -- notification is a lot easier to
9 change than it is to change a label, and that's what we have put
10 forward.

11 THE COURT: All right. Let me hear from the
12 plaintiffs.

13 MS. GOLDMAN: Your Honor, the difference between the
14 two proposals is that ours would be a point of sale notification
15 and EPA's would not necessarily be. It would prepare generic
16 information that could be put near a product if somebody chooses
17 to, but it would not be required.

18 We believe EPA has the authority to do this, and would
19 direct the Court to the Chemical Manufacturers Association case
20 in the Ninth Circuit, where California required point of sale
21 notifications, and the industry challenged them on FIFRA
22 preemption grounds.

23 And what the Ninth Circuit said is that point of sale
24 notifications are not labeling, so they are not what is
25 regulated through the FIFRA process. So there is no bar to

1 require them outside of the FIFRA process.

2 And that was the ruling in the New York versus Jorling case
3 as well, the Second Circuit decision. We cited both of those in
4 our papers. So what we -- what we're asking for is very brief
5 information that is not about how to use the pesticides, but is
6 just a notice to the purchaser at the point of sale linked to
7 the product. And we believe there's ample authority. Without
8 costly label amendment processes, EPA could do a pesticide
9 registration notice directing registrants to make this
10 information available with the products at the point of sale.

11 THE COURT: Okay. Let me hear from the intervenor.

12 MR. KLISE: Your Honor, we intervenors do have a
13 substantive concern on this, and that is however the
14 notification is made what is the substance of it to be. And
15 we've explained in the paper that we filed along with the
16 government's proposed form of order that we cannot go along with
17 assuming the obligation to distribute information that in
18 substance discourages people from using the very products we
19 manufacture.

20 Rather, we do come down much more strongly on the side of
21 the educational component, that is, educating people in the
22 proper use of these products. And we think especially because
23 this is simply interim relief, and not some kind of final
24 decision that's going to be imposed by the EPA after
25 consultation, that that more general type of an education

1 program is appropriate here.

2 THE COURT: Okay. Here's what we're going to do:
3 We're going to use the EPA proposal regarding the point of sale
4 notice, and with language as proposed by the plaintiffs in that
5 point of sale notification. All right?

6 Now --

7 MS. GOLDMAN: Can I ask a question? Is there any
8 requirement that the information be posted at the point of sale
9 where these pesticides are sold?

10 THE COURT: It is required that it be available to the
11 purchaser at the point of sale and in a way that the purchaser
12 knows or receives a copy of the notice.

13 MS. GOLDMAN: Thank you.

14 THE COURT: Okay. I want a proposed draft from
15 plaintiffs of this injunction by December 15th, and any specific
16 objections to language from the opposition by December 20th.
17 And get a copy of your proposal to them by fax or email on the
18 15th, so that there isn't a mail problem. And I will, in all
19 events, try to enter an order before the year-end.

20 All right. Anything else?

21 MS. GOLDMAN: Yeah, I'd like to ask one other question.
22 In referring to the StreamNet database, since that database does
23 not include estuaries, I understood the Court to indicate
24 estuaries should be included, so we should specify they are
25 included, even though they're not identified.

1 THE COURT: Yes, to the extent that salmon use those
2 estuaries.

3 MS. GOLDMAN: Thank you.

4 THE COURT: All right. Anything else?

5 MR. KLISE: I have one point of clarification, Your
6 Honor, and this also goes to the identification of the water
7 bodies point. And I think you mentioned when we first started
8 speaking you were referring to the ordinary high watermark,
9 which is what plaintiffs proposed as the starting point of
10 measuring the buffers. Defendants proposed order uses the
11 actual waterline at the time. So I'm wondering which side of
12 that issue you're coming down on.

13 THE COURT: Ordinary high watermark.

14 MR. KLISE: Thank you.

15 THE COURT: All right. We'll be in recess.

16 (Recess.)

17 CERTIFICATE

18

19

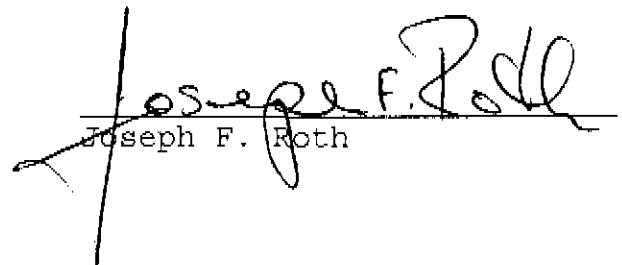
20 I, Joseph F. Roth, Official Court Reporter, do hereby
21 certify that the foregoing transcript is correct.

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Joseph F. Roth